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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS G. KLOPP,

Defendant and Appellant.

2d Crim. No. B236591
(Super. Ct. No. 2011010033)
(Ventura County)

Nicholas G. Klopp appeals the judgment entered after a jury convicted him of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] simple assault (§ 240), and interference with civil rights (§ 422.6, subd. (a)). The jury also found that both assaults were hate crimes (§§ 422.7, subd. (a), 422.75, subd. (a)). The trial court sentenced him to five years in state prison. Appellant contends the court erred in failing to give a self-defense instruction on the charge of assault with a deadly weapon. He also claims the court erroneously imposed a hate-crime enhancement under subdivision (b) of section 422.75, instead of subdivision (a). We shall vacate the two-year enhancement and remand for resentencing under the proper subdivision. Otherwise, we affirm.

[1] All statutory references are to the Penal Code.

STATEMENT OF FACTS

Prosecution

On the night of December 18, 2010, Adam Calvert celebrated his 27th birthday at O-Sabi restaurant along with a group of about 20 people that included his father David[2] and victims Brian Schumacher and Aaron Argueta. At one point during the evening, Adam and two of his friends went outside to smoke cigarettes on the restaurant's patio. Appellant was sitting at a nearby table with his wife Ashley, Roy Miller, and Shawn Lamberson. Someone in appellant's group asked Adam and his friends if they could "back off a little bit." After they did so, someone from appellant's group said, "stay over there."

Adam spit on the ground while he was smoking. A male voice from appellant's group said, "I thought faggots swallowed, didn't spit." Adam, who is openly gay, was offended by the comment but did not respond.[3] Adam wanted to avoid a confrontation, so he and his friends returned to their table inside the restaurant.

After they had finished their meal, Adam told David what had happened on the patio. David went out on the patio and told appellant's group it was his son's birthday and that their remarks to him were inappropriate. Appellant walked up to David, pushed him in his chest, and said "nigger" and "faggot." When David opened the door to go back inside, appellant pushed him back into the corner. David forced the door open and went inside.

David joined the rest of Adam's group as they were preparing to leave the restaurant. When they walked out the front door, they encountered appellant's group leaving through the patio gate. Appellant, who was holding an 8-ounce glass tumbler he had taken from the restaurant, looked at Adam's group and angrily said, "you fucking faggots." Appellant then let loose "a continual barrage of cusswords and sexual slurs"

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[2] For the sake of clarity and convenience, we refer to parties with the same last name by their first names. No disrespect is intended.

[3] Adam was wearing a rainbow-colored lei the restaurant had given him to celebrate his birthday. The rainbow flag is a symbol of gay pride.

that included "faggot," "fucker," and "nigger."[4] Ashley unsuccessfully tried to calm appellant down.

Schumacher was standing near the back of Adam's group, about 10 to 15 feet away from appellant. Schumacher called appellant a "bigot" and asked him why he was "being such an ass." Appellant took a couple of steps toward Schumacher and threw the glass tumbler at him with an overhand motion "like a baseball," hitting him in the head. Schumacher received a cut above his right eye that began profusely bleeding. He felt dizzy and incoherent and fell to the ground. Adam and David pulled Schumacher back into the restaurant and asked someone to call the police.

Argueta walked up to appellant and said "get the fuck out of here" and told appellant, "If you're going to do something about it, do it." Appellant responded by punching Argueta in the mouth with his fist.

Appellant's group left in appellant's car and Miller's truck. Schumacher was taken to the hospital for treatment of his wound, which required three stitches.

When appellant was arrested later that night, he was found to have tattoos that included images of swastikas and a Celtic cross. T-shirts with Nazi symbols and the words "White Pride," "Skin Industries," and "White Devil Industries"[5] were found in appellant's master bedroom closet along with a pair of black leather steel-toe boots of the type worn by skinhead white supremacists. Officers also found a CD cover with a picture of Adolf Hitler with song lyrics such as, "When it smells like queers out on the street, you're in Portland." Other covers included pictures of a German SS soldier, a

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[4] Argueta, who is of Salvadorian descent, was the darkest skinned and tallest individual in Adam's group. Argueta testified that appellant said his "nigger" remarks were directed at "the tall one."

[5] Skin Industries sells a brand of clothing worn by white supremacist skinheads. White Devil Industries was an internet company that sold white supremacist items before its owner was sentenced to prison for a hate crime.

Totenkopf,[6] and a yellow "smiley" face superimposed on the face of a Nazi solider about to execute a person standing next to a ditch of bodies.

Detective Daniel Stegner of the Ventura County Police Department testified as an expert witness on white supremacy. When presented with a hypothetical including the items seized from appellant's residence and his tattoos, Detective Stegner opined that the hypothetical individual was a white supremacist.

Defense

Ashley testified in appellant's defense. She and appellant were at O-Sabi that night for a holiday party hosted by appellant's employer. Miller worked with appellant and attended the party with his wife. The group was accompanied by Lamberson, who was living with appellant and Ashley at the time.

Appellant drank a beer while they waited to be seated. During dinner, he had three double cocktails and drank sake. After the party ended at about 8:30 p.m., appellant, Ashley, and Lamberson remained sitting at their table with Miller and his wife. Tomiichi Maruyama, O-Sabi's owner, told the group he needed the table for another party and offered to buy them a round of drinks if they relocated to a table on the patio. Ashley went with Maruyama to get the drinks while appellant and the others went outside. Ashley brought appellant another rum cocktail, even though she believed he had vomited in the restroom at some point during dinner. Appellant was coming to the patio from the restroom when Ashley arrived. He was staggering, so Ashley helped him to a chair.

At some point, appellant vomited in the fountain on the patio. Miller jokingly said, "Hey, dick, I thought fags swallowed." Appellant "flipped off" Miller and continued vomiting. Two men who had been on the patio smoking went back inside the restaurant. Another man who appeared to be intoxicated then came out and angrily asked who had called his son a "fag." No one in appellant's group responded in a hostile

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6 A Totenkopf is the "skull and crossbones" symbol worn on the uniforms of members of the Nazi SS unit in charge of concentration camps. The symbol is now associated with Neo-Nazis and skinheads.

manner. Lamberson, who had been in the restaurant when the man came out, held the door open and encouraged him to go back inside.

After the man left, Lamberson suggested it was time to leave and everyone agreed. Miller and his wife exited through the patio gate, and appellant and Ashley followed behind. Ashley remembered that she had left her umbrella inside the restaurant, so appellant went to retrieve it while Ashley waited near the entrance. Appellant came out with the umbrella a few seconds later. Neither appellant nor anyone else in their group had a glass in their hands.

Appellant and Ashley were walking toward the parking lot when Adam's group came out of the restaurant. A man Ashley subsequently identified as Argueta came up behind appellant, pushed him, and called him a "bigot son of a bitch." When appellant turned around, Argueta repeatedly "chest-bump[ed]" him and yelled that he was going to "fuck him up." Five or six other men joined Argueta, who "towered over" appellant. All of the men were yelling and screaming. Another man from Adam's group said it was all a misunderstanding and that everyone should go home. Appellant held Ashley's umbrella in one of his hands throughout the confrontation.

Ashley feared for her and appellant's safety, so she yelled to Miller for help. Miller walked back and stood to the left of appellant, while Lamberson stood to appellant's right. Ashley thanked the man from Adam's group who had tried to diffuse the situation and told him they were leaving. Several men from Adam's group had to restrain Argueta, who had continued to yell and threaten appellant. Ashley said "let's go," and appellant replied "okay" as he began slowly walking away. Appellant and Ashley were driven to their home and they went to bed. The police arrived and arrested appellant about 45 minutes later.

Ashley claimed that the black boots found in the closet belonged to her, not appellant. Miller had given them to her as a gift but she never wore them. Other shoes with a red iron cross imprinted on them were also Ashley's and were not intended as a representation of white supremacy. Although she claimed that the racist shirts found in the closet had belonged to her deceased stepbrother, a photograph taken before the

stepbrother's death depicted appellant wearing one of the shirts. She claimed not to know who owned the CD covers found in the family room and garage, although she knew they were not appellant's.

Ashley has an African-American friend and several relatives who are of mixed races. The person who officiated over their marriage at a Las Vegas wedding chapel was also African-American. When Ashley was "16 and stupid," she got a tattoo of a swastika inside an iron cross due to the influence of friends and family members who harbored white supremacist beliefs. After the incident at O-Sabi, she had the tattoo covered with another tattoo depicting skulls with pink bows and dice and the words, "True love never dies."

Rachel Merrell is a close friend of both appellant and Ashley. Merrell heard Ashley's testimony about the CD covers and realized that they belonged to her. Merrell had left the CD covers during a time when she and her husband were living there along with their four children. Merrell admitted that she and her husband are white supremacists. She also confirmed that Miller, who she thinks of as a brother, is also a white supremacist. She did not consider appellant to be one, however. Photographs posted on Merrell's MySpace page that were taken in May 2008 depicted appellant wearing one of the shirts that purportedly belonged to Ashley's deceased stepbrother, who died in September 2009.

DISCUSSION

I.

Instruction on Self-Defense (CALCRIM No. 3470)

Appellant requested the self-defense jury instruction (CALCRIM No. 3470) on both count 1 (assault with a deadly weapon against victim Schumacher) and count 2 (battery against victim Argueta).[7] The court gave the instruction on the latter count, but refused it on the former. Appellant contends the court's refusal to give the instruction on count 1 violated his constitutional rights to due process and a fair trial. We disagree.

[7] Appellant was found guilty of assault as a lesser included offense of battery.

"A defendant is entitled to instruction on request on any defense for which substantial evidence exists. [Citations.] However, the trial court need give a requested instruction concerning a defense only if there is substantial evidence to support the defense. [Citation.]" (*People v. Miceli* (2002) 104 Cal.App.4th 256, 267; see also *In re Christian S.* (1994) 7 Cal.4th 768, 783.) To be substantial, the evidence must be of ponderable legal significance, reasonable in nature, credible, and of solid value. (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336; *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) If the evidence is minimal and insubstantial, the trial court need not instruct on the defense. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, overruled on another ground in *In re Christian S., supra*, at p. 777.) We review the trial court's determination de novo and independently decide whether there was substantial evidence in the record to support the requested instruction. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

To warrant a self-defense instruction on the charge of assault with a deadly weapon against victim Schumacher, there had to be substantial evidence that appellant (1) actually and reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; (2) reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and (3) used no more force than was reasonably necessary to defend against that danger. (CALCRIM No. 3470; *People v. Romero* (1999) 69 Cal.App.4th 846, 853.) No such evidence existed here. The prosecution's theory was that appellant instigated the confrontation and did not face any physical threat when he threw the glass tumbler at Schumacher. Appellant denied throwing the glass. Neither of these scenarios supports a self-defense instruction.

Appellant proffers an alternative factual scenario from which the jury purportedly could have inferred he "threw the glass at Argueta or someone else as Argueta and others converged upon him." He claims the jury could have disbelieved his wife's testimony that he did not throw the glass, yet believed her account that Argueta and several other men accosted appellant for no apparent reason. (See *People v. Elize* (1999) 71 Cal.App.4th 605, 615 [courts must give requested self-defense instructions

where "there is substantial evidence of a defense inconsistent with the defense advanced by the defendant"].) Even if the jury could have reasonably made such an unlikely credibility determination, it would not have led to a reasonable inference that appellant reasonably believed he had to use *deadly force* to protect himself, much less that he used no more force than was reasonably necessary.

Even if the instruction should have been given, the error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [no reasonable probability that error affected verdict]; *Chapman v. California* (1967) 386 U.S. 18, 24 [error did not affect verdict beyond a reasonable doubt]; see also *People v. Salas* (2006) 37 Cal.4th 967, 984 [recognizing that the court has yet to decide which harmless error standard of review applies to the failure to instruct on an affirmative defense].) The jury accepted the prosecution's version of the facts, as reflected in its rejection of appellant's claim that he acted in self-defense against Argueta.[8] The jury also expressly found that appellant threw the glass *at Schumacher* because he was biased against him based on his perceived sexual orientation and not in self-defense. (§ 422.75; CALCRIM No. 1354.) Appellant's claim of instructional error accordingly fails.

II.

Sentencing Error

Appellant contends that in sentencing him on count 1, the court erroneously imposed a two-year hate crime enhancement under section 422.75, subdivision (b). He claims the sentence should be modified to reflect a one-year term under subdivision (a) of the statute. The People acknowledge that the court erred in sentencing appellant under subdivision (b), yet contend the matter should be remanded for resentencing under subdivision (a). We agree that remand is warranted.

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[8] Appellant argues that the jury's rejection of his claim of self-defense as to Argueta does not render harmless any error in failing to instruct on the defense with regard to his charged assault of Schumacher because "under the instructions, the jury could have found that appellant was acting in self-defense, but that the force used was excessive." This assertion is belied by the instruction, which plainly states that "[i]f the defendant used more force than was reasonable, [he] did not act in lawful self-defense." (CALCRIM No. 3470.)

Section 422.75 provides sentence enhancements for hate crimes. Under subdivision (b) of the statute, a defendant who commits a hate crime in concert with someone else "shall receive an additional two, three, or four years in the state prison, at the court's discretion." Subdivision (a) governs when a defendant acts alone and provides for an additional term of one, two, or three years.

Count 1 of the information alleged that appellant committed the assault against Schumacher "voluntarily and in concert with another and others in violation of Penal Code section 422.75(b)." During the discussion on jury instructions, the court made a factual determination that the prosecution had presented no evidence that appellant committed the crime in concert with anyone else and accordingly declined to instruct the jury as to that theory. The court instead gave instructions on the hate crime allegation stated in subdivision (a) of section 422.75,[9] and the jury found the allegation to be true.

At sentencing, the court selected count 1 as the principal term and sentenced appellant to the midterm of three years "because of the aggravating factors the Court has considered set forth in California Rules of Court, Rule 4.421[,] specifically the fact that the defendant was on probation at the time of this offense, the fact that his performance on probation was unsatisfactory, and the fact that the defendant used a weapon, specifically a drinking glass." The court then proceeded to state: "Pursuant to Penal Code Section 422.75 subdivision *(b)*, an additional and consecutive term of two years is imposed." (Italics added.) Both the minute order and abstract of judgment also indicate that appellant was sentenced to an additional two-year term under subdivision (b) of section 422.75.

The parties agree that the court erred in imposing sentence under subdivision (b) of section 422.75, rather than subdivision (a). They disagree, however, on the remedy for that error. According to appellant, "[t]he trial court clearly intended to

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[9] CALCRIM No. 1354 includes the relevant language as to both subdivisions of section 422.75. In instructing the jury, the court simply removed the language referring to subdivision (b).

impose the low term under subdivision (b). Thus, this court should modify appellant's sentence to impose the low term of one year . . . pursuant to section 422.75, subdivision (a) . . . ." The People contend the matter should be remanded for resentencing. We agree with the People. Because the record does not affirmatively reflect the court's intent, remand is both necessary and appropriate. (§ 1260.)

DISPOSITION

On count 1, the two-year enhancement imposed under section 422.75, subdivision (b), is vacated. The matter is remanded for resentencing on the enhancement under subdivision (a) of section 422.75. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Kevin G. Denoce, Judge

Superior Court County of Ventura

Linda C. Rush, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Douglas L. Wilson and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.